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No. 93-1133

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,
*Petitioners,*

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine**

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## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

### INTRODUCTION

Petitioners Town of Gray ("Gray") and Regional Waste Systems, Inc. ("RWS") file this Reply Brief to correct factual misstatements and respond to legal arguments included by Respondents in their Brief in Opposition to Petition for Writ of *Certiorari* ("Respondents' Brief").

Petitioners seek review of a question of law from the court of last resort in Maine, the Maine Supreme Judicial Court. That court, known as the Law Court, found that Gray's Solid Waste Flow Control and Recycling Ordinance (the "Ordinance") "has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line." Pet. App. at 6a.

Petitioners assert that as a matter of law, no discriminatory effect upon interstate commerce—as that phrase is construed in Commerce Clause jurisprudence—exists in this case. If this Court agrees that the Ordinance has no discriminatory effect on interstate commerce, the inquiry into this case should end and the Ordinance should be upheld. In the alternative, if this Court agrees that federalism or the Resource Conservation and Recovery Act of 1976 ("RCRA") authorizes the enactment and enforcement of the Ordinance so that the dormant Commerce Clause is inapplicable to this case, or that solid waste is not an article of interstate commerce, the Commerce Clause analysis should end and the Ordinance should be upheld.

If, however, this Court decides that the Ordinance has a discriminatory effect on interstate commerce, Petitioners assert that the appropriate legal test for weighing the legitimacy of the Ordinance is the test articulated in *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970). The content of the Law Court's opinion (as contrasted with its

holding), and particularly its comment that "Rather, Gray's Ordinance appears to pursue legitimate local goals by gaining control of the waste stream and promoting recycling and energy recovery" (Pet. App. at 6a), substantially supports the conclusion that the *Pike* test is the appropriate one to apply. The Law Court's conclusion that "Gray's Ordinance does not facially discriminate against out-of-state interests, and so it escapes *per se* invalidity" (Pet. App. at 6a) also militates for a finding that the balancing test articulated in *Pike* is the appropriate test.

It is critical that the Court accept review of this Petition and rule on the legal issue therein because confusion and a waste of judicial and municipal resources will otherwise result during remand proceedings.

## ARGUMENT

### I. RESPONDENTS' ARGUMENTS REST UPON SEVERAL MISSTATEMENTS OF FACT.

Respondents' Brief contains several factual misstatements which go to the core of the issues raised by the Petitioners, and which therefore require a response and clarification. Respondents' Brief at Page 3 states that commercial haulers are denied access to the Gray Transfer Station for delivery of recyclable materials. This question has been addressed several times during the course of this litigation. Gray and RWS repeatedly have stated that commercial haulers are not denied access to the Gray Transfer Station for delivery of recyclable materials; while they must deliver Acceptable Waste to the RWS waste-to-energy facility (the "Facility"), Respondents and other commercial haulers must, pursuant to Sections VII G and H of the Ordinance, deliver any recyclable materials they may collect to the Town at its Transfer Station. Pet. App. 24a and 62a. Respondents' statement is simply wrong.

Also at Page 3 of Respondents' Brief is the assertion that Gray and RWS have "ordered an embargo of all solid waste generated in Gray," and that "the commodities [solid waste] are quarantined." It is unclear what Respondents hope to gain by the misuse of the terms "embargo" and "quarantine." Gray has done nothing but direct the solid waste generated within its municipal borders to the appropriate solid waste management facilities. Petitioners are not attempting to insulate themselves from out-of-town or out-of-state waste; indeed, RWS has on occasion accepted out-of-state solid waste on the spot market. Thus, there is no "embargo" or "quarantine" in effect in this case.

In addition, Respondents' Brief contains several misstatements of the Law Court's decision in this action. For instance, Respondents' Brief states at Page 4 that the "Maine Supreme Judicial Court found correctly that the Ordinance is an impermissible interference with interstate commerce because it seeks to reserve a valuable commodity from trade for the exclusive use of RWS." Nowhere did the Law Court find that the Ordinance is an impermissible interference with interstate commerce. Any such finding presumably would have ended the Commerce Clause inquiry and with it, this litigation. Rather, the Law Court found that the Ordinance "has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line." Pet. App. at 6a. Moreover, the Law Court did not base its finding of discrimination on Petitioners' reserving any valuable commodity from trade. The Law Court acknowledged that solid waste is an "object" of interstate commerce, but stated nothing regarding any commodity or reserving such commodity. Pet. App. at 4a. This misstatement apparently seeks to implicate the line of Commerce Clause cases wherein states have reserved natural resources such as coal or oil from interstate trade, but this analysis does not apply to flow control ordinances.

In another instance of misstating the decisions below, Respondents' Brief states at Page 4 that Gray, under the Law Court's decision, must "demonstrate that the Ordinance was not adopted for economic protectionism and that there are no reasonable alternatives for the disposal of waste." Instead, the Law Court stated that "Gray and RWS must therefore show valid reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives *to the Ordinance* are unavailable." Pet. App. at 6a (emphasis added). Nowhere does the Law Court even suggest that Gray and RWS must show that there are no reasonable alternatives for the disposal of waste other than at the Facility.

## II. RESPONDENTS' LEGAL ARGUMENTS MUST BE REJECTED.

Respondents argue that: (1) the Petition is premature because the Law Court's decision does not constitute a final judgment for purposes of review by this Court; (2) the Ordinance is facially discriminatory; (3) Petitioners did not raise the issue of federalism in the Maine courts; and (4) RCRA does not authorize the Ordinance nor was this issue raised below. Respondents' Brief at pp. 4-10. A brief response to these arguments follows.

### A. The Issues Presented in the Petition are Appropriate for Review by this Court.

The Respondents incorrectly state that the Law Court's decision does not constitute a final judgment. As noted above, the Law Court is the Maine court of last resort and has rendered a final judgment regarding the federal constitutional law to be applied to this case on remand.

In addition, for two reasons, Respondents' reliance upon *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 460 (1975) as authority for their position is misplaced. One reason is that *Cox* is inapposite to the case at bar because it involved an appeal to the U.S. Supreme Court

under the former 42 U.S.C. § 1257(2) (repealed and replaced) rather than a petition for writ of *certiorari.*

The second reason is that if *Cox* is applicable to this action, the case at bar fits within three of the four categories of cases identified in *Cox* in which it has been held that there was a final judgment, despite the fact that further state court proceedings had been ordered. The *Cox* opinion concerned an appeal from a decision of the Georgia Supreme Court, which held that the trial court erred in holding that a Georgia rape shield statute extended a civil cause of action for invasion of privacy, but which also held that the complaint stated a cause of action for a common law tort and ordered the case remanded. 420 U.S. 469 at pp. 474-475. Holding in *Cox* that the decision from which the appeal had been taken was final, the Court continued to employ a practical, rather than technical, construction of finality, and identified four categories of cases "in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477.

Those four categories are as follows: (1) "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) those cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings;" (3) those cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case;" and (4) those cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which

the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-483.

The Law Court's decision in this action fits within each of the first three categories of cases identified in *Cox*. As to the first category of cases, the Law Court has reviewed the dormant Commerce Clause jurisprudence and has held that the Ordinance "has a discriminatory effect on interstate commerce" and has placed the burden of proof on Petitioners. Thus, this Petition presents questions of federal constitutional law—whether the Law Court erred in holding the dormant Commerce Clause applicable, and even if it did not, whether it erred in placing the burden of proof on Petitioner and in its statement of that burden of proof. These are questions which the state court of last resort has decided in a manner that dictates the course of further proceedings. As to the second category of cases, to the extent that Petitioners still may be able to challenge the Law Court's decision regarding the applicability of the dormant Commerce Clause to this case and the burden of proof in any appeal from the remand proceedings, then the same federal constitutional issues once again will be presented to this Court. As to the third category of cases, the questions of the applicability of the dormant Commerce Clause to this case, and of the appropriate test thereunder if it is applied, may not survive the remand proceedings. The remand proceedings would occur in accordance with the Law Court's holdings that: (1) the dormant Commerce Clause jurisprudence is applicable and (2) Petitioners bear the burden of proof to show valid reasons for the Ordinance other than economic protectionism and that reasonable alternatives to the Ordinance are unavailable.

It may well be that the only appealable issue after proceedings on remand would be whether Petitioners met their burden of proof. In such an instance, the Law Court judgment must be held final or else the federal constitutional issues would escape review by this Court.

Finally, considerations of practicality dictate that the Law Court's decision be deemed a final judgment for purposes of review by this Court. Should this Court's pending decision in *Town of Clarkstown v. C&A Carbone, Inc.*, 587 N.Y.S. 2d 681 (1992) *cert. granted*, 126 L.W. 2d 369, 62 U.S.L.W. 3334 not decide the issue presented here, and should Petitioners proceed to trial without the issue presented here being addressed by this Court, Petitioners will be forced to expend public resources and consume a great amount of the Maine judiciary's time to offer proof regarding what may well be the wrong legal standard.

**B. The Gray Ordinance Is Neither Discriminatory On Its Face Nor Should It Be Reviewed Under The "Strict Scrutiny" Standard.**

Petitioners stand by the arguments raised at pages 22-27 of the Petition in this regard, and will not repeat those arguments here. Petitioners simply wish to take exception with two of the statements contained in Respondents' Brief at pages 6 and 7.

First, while Respondents argue that the Ordinance is facially discriminatory, their statement that both state courts in this proceeding have made such a finding is wholly erroneous. Respondents state, without any record support, that "The findings by the trial court completely describe the nature of the intrusion upon interstate commerce and concede that the Ordinance is facially discriminatory. The Maine Supreme Court. therefore, affirmed the findings of fact by the trial court." Respondents' Brief at p. 7. What the trial court actually found was that the Ordinance had "some effect on interstate

commerce. But I can't imagine that what the Town is doing is having such an effect on interstate commerce that is violates applicable constitutional standards." Pet. App. at 39a. That finding does not, under any reasonable interpretation, rise to the level of facial, or *per se*, discrimination as claimed by Respondents. Indeed, the trial court's upholding of the Ordinance against Respondents' Commerce Clause challenge evidences an application of the *Pike v. Bruce Church, Inc.* balancing test. *See* Pet. App. at 38a-39a. Moreover, the Law Court specifically held that "Gray's Ordinance does not facially discriminate against out-of-state interests, and so it escapes *per se* invalidity." Pet. App. at 6a. Thus, while Respondents may argue that the Ordinance facially discriminates against interstate commerce, they egregiously misstate the findings of the courts below in even suggesting that those courts found the Ordinance facially discriminatory.

Second, Respondents' Brief at Page 7 discusses the concept of hoarding of raw materials with regard to Commerce Clause jurisprudence. Nowhere, either at the trial court level or before the Law Court, was there any finding or discussion of the hoarding of raw materials. Again, these phrases seek to invoke Commerce Clause jurisprudence regarding raw materials such as coal or oil where states have improperly sought to exclude the importation of refined products from other states or have sought to restrict the raw material for processing at in-state facilities. This analysis is irrelevant to the issue of a municipality performing the local police power function of solid waste management.

### C. The Petition Properly Raises The Issues Of Federlism, RCRA And The Inapplicability Of The Dormant Commerce Clause To The Gray Ordinance.

Respondents argue that Gray and RWS are not permitted to advance a federalism argument or to argue that RCRA authorizes the Ordinance. Respondents' Brief

at pp. 4, 8-10. Contrary to Respondents' representations, however, these arguments do not constitute a new cause of action or theory for relief.[1] Rather, these arguments are additional ways of stating the inapplicability of dormant Commerce Clause jurisprudence to the Ordinance. In this regard, *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969) cited by Respondents, is inapplicable. In *Cardinale*, the U.S. Supreme Court found that the sole federal question had never been raised, preserved or passed upon in the state courts below, and therefore dismissed the Petition for a Writ of *Certiorari* for lack of jurisdiction. Here, by contrast, the federalism and RCRA arguments do not raise new questions of law; the issue of the Ordinance's validity under the Commerce Clause was raised by Respondents at the inception of this litigation and *Cardinale* is therefore inapposite. Moreover, the federalism and RCRA arguments raised by Petitioners

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[1] Respondents argue that the federalism issue "would necessarily involve an examination of the congressional intent to displace interstate commerce," and would have resulted in "extensive dialogue regarding conflicting policy goals," if it had been raised below, and so cannot be raised now. Respondents' Brief at pp. 8-9. However, all parties will have the opportunity to present and argue congressional intent on this issue if the Court grants the instant Petition. Respondents also argue that issues such as residual ash disposal and air quality would have been raised by it below. Respondents' Brief at p. 7. However, there has been no evidence or discussion of residual incinerator ash or air quality with regard to the legal or factual issues in this case, and many of Respondents' contentions are wrong. For example, the ash from the RWS facility currently goes to a specially designed and constructed ash landfill and is not simply "dumped in a landfill". In addition, the State of Maine has developed a comprehensive waste management plan and is investing a considerable amount of money siting and building a special waste landfill to accommodate ash from waste-to-energy facilities in the future. Moreover, in addition to the absence of any evidence in the record of waste-to-energy facilities causing air pollution and the irrelevance of this discussion to the legal issue before this Court, RWS is a facility that is licensed by the State and is currently in compliance with all federal and State air quality laws.

involve questions of federal law, rather than the state law question belatedly raised in *Cardinale*.

Finally, as to the merits of Petitioners' federalism and RCRA arguments, Petitioners rely on the arguments in this regard contained in their Petition at Pages 15-22. In answer to Respondents' specific contention that waste-to-energy facilities can be financed solely upon a pledge of the full faith and credit of the participating municipalities, Petitioners assert that the Waste Handling Agreements' requirement that each RWS Member Municipality both enact a flow control ordinance *and* pledge its full faith and credit for payment of tipping fees reflects the reality of lending requirements for the RWS Facility and presumably for other similar facilities.

## CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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